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MARITIME LIENS.

I.—LIEN OF THE SHIP ON THE CARGO.

Maritime law, and the principles of which it is constituted, are not composed of doubtful opinions, or fanciful and unsettled systems. Some of its regulations rest on positive adjudications; others, on usages established among nations from necessity, the utility of which has been demonstrated by a lengthy and satisfactory experience. The right of lien is one of those commercial regulations which are founded on manifest justice and comprehensive utility, and is a privilege which the law takes under its special protection. The right of the common carrier to retain the goods committed to his care, for the freight due thereon, most probably had its origin in the necessities of primary commercial intercourse, though subsequently abundantly ratified by direct authority, and now universally acknowledged as a principle of common law, which entitles a party who is *compelled* to receive and transport the goods of another, to *retain* them for his indemnity.[1]

As far back as the authorities upon this subject lead us, we find the acknowledgment of this doctrine of retention for the satisfac-

[1] Smith's Mercantile Law, 535.

tion of legitimate claims, with the further assurance that it had been exercised for years.[1] It is thought we may safely assume that the general proposition, that the owner of a ship has a lien on the goods in his possession for the freight due under the contract of shipping, has never been questioned. It has received the sanction and support of an unbroken series of decisions, until now the general rules of the common law concerning liens are well settled. In consideration of the duties and liabilities imposed upon persons engaged in certain business, or on account of the usages of trade, the law recognizes in those whose expenditures or services have contributed to enhance the value of the property of others in their hands, the right to retain the possession of that property, until compensation has been made for their labor and consequent advancement of value.[2]

This privilege of retaining possession of the cargo, until freight was discharged, appears to have been allowed by the maritime codes of Europe. By the civil law, as well as by those of Oleron, the lading of the ship is subject to detention not only for the freight, but for the primage and average due in respect of it. A like privilege was given by the marine ordinance of France, and according to the present acceptation of commercial law, whether the ship be a chartered or a general one, the master need not relinquish the possession of any part of the cargo, until the freight and charges due on its account are discharged.

It may be stated in beginning, that freight only becomes due at the common law, for the regularly bringing of the goods to the place of destination, pursuant to the stipulations of the contract of shipping, and only under such circumstances can the claim of lien be attached to the cargo. The shipper may, however, waive by an independent agreement, the further prosecution of the voyage and receive the goods at an intermediate port, and then a lien exists for the amount specified in the special contract.[3] As we have before said, the right of lien, is the right of retaining possession of certain property, till your claim against it is discharged.[4] The fact of

[1] 2 Ld. Raym. 752.
[2] 10 Conn. 104.
[3] 3 Sumn. 542.
[4] 4 Johns. Ch. 582; 20 Johns. 611.

retention, implies of necessity, *a previous lawful and legitimate possession*, and of course this privilege can only be exercised when the owner of a vessel has possession and control of his ship himself, for then only does he have constructive possession of the goods on board, so as to justify a claim for lien.[1] The owner is entitled to detain any part of the merchandise for the freight of all that is conveyed on account of the same person, for he only lessens, and does not destroy or conclude his security by delivering up any part of it.[2] "The lading of the ship," says Molloy, "is in construction of law, tacitly obliged for the freight, the same being in point of fact, preferred to any other debts to which the goods so laden are liable. Even though such debts are precedent to the freight, for the goods remain, as it were, *bailed* for the same; nor are they subject to attachment in the master's hands, though vulgarly is conceived otherwise."[3]

As the right of detention is only intended for the better security of those who perform services or incur expenses in respect of property in their hands, such person may limit or waive this right by virtue of a special contract. This lien has grown out of the usages of trade, and does not exist, and cannot be enforced when waived by inconsistency.[4] If personal credit is given or another and an independent security is taken, for the payment of that debt for which the party has a lien, by such conduct the lien is vacated.[5] If the ship owner claims possession of the goods for reasons different from his lien, he will be considered as having abandoned that security, and the goods will be discharged from the claim.[6] A right of lien is not however determined by an alteration in the ownership of the goods over which it is exercised, after the claim has once attached.[7] When the price of transportation is refused when tendered, or if in the absence of such tender, the ship owner has refused to deliver the goods upon payment of just freight, the possession becomes tortious, and the lien is lost.[8] As continuance of possession

[1] 4 Mass. 91; 6 *Id* 422; 11 *Id.* 72, 145; 1 Hall, 355.

[2] 6 East, 622; 3 Duer, 224.

[3] De Jure Maritimo, B. 2, C. 4, S. 12; 6 M. & W. 36.

[4] 18 Johns. 157.

[5] 2 Bing. N. C. 755.

[6] 2 Bing. 23.

[7] 9 Bing. 574.

[8] 9 M. & W. 675; 7 *Id.* 288.

is indispensable to the existence of this right, an abandonment of the custody of the matter over which this right extends, operates as an absolute waiver of the lien, for in such cases the holder yielding up the security which the lien afforded, trusts alone to the shipper's personal responsibility.[1]

In case of charter-parties it often becomes a question of great moment to ascertain whether the terms and stipulations of that instrument are or are not inconsistent with the existence of a lien, for it is well settled that the owner of a vessel may by special contract relinquish his lien on goods carried under a bill of lading, or he may entirely divest himself of his rights and liabilities as owner, and by a charter-party demise them to another. As the benefit of this claim was originally designed for the protection of those who had entered into no agreement for the payment of freight, but relied exclusively on their common law rights, it was formerly considered that whenever a contract was entered into on that subject, there could be no lien.[2] This opinion was however controverted by high authority, and it was decided that the existence of a special contract between a common carrier and his employer concerning the services to be performed, and the compensation to be rendered, does not deprive the former of his privilege of lien, unless there is something in that contract inconsistent with such lien.[3] It is needless perhaps, to say that the courts will favor and enforce the lien unless there plainly appears a relinquishment of such security by the owner of the vessel.[4] In truth, the doctrine once so broadly asserted by the English courts, that by any charter-party, the rights and duties of the owner were suspended, and the charterer became owner *pro hoc vice;* that the owner had thereby parted with the possession and control of the ship and cargo, and of necessity could exercise no lien, has been much qualified and defined by subsequent decisions.[5] Now, all the authorities upon this subject acknowledge the right of the vessel's owner to retain the goods of the charterer for the sum due by the terms of the charter-party, unless he has

[1] 1 Atkyn, 234; 1 Mo. & R. 252.
[2] Sayer, 224; Buller's N. P. 45.
[3] 5 M. & S. 180; 10 Conn. 104.
[4] The Volunteer, 1 Sumn. 551
[5] Crosson Lien, 301; 7 Taunt. 14.

expressly and totally demised the possession of the ship to the occupier himself.[1] Whether the possession of a vessel and the accompanying privileges are thus designed to be given up and transferred to another, is a matter to be ascertained and determined by the intention of the parties as manifested in the terms of the charter-party, and by the actual circumstances of each case. The exposition of its opinion by our Supreme Court is at once clear and comprehensive. It holds, "that when the general owner retains the possession, command and navigation of his ship, and contracts to carry a cargo on freight for the voyage, the charter-party is a mere affreightment sounding in covenant. The owner does not transfer, but retains his character and legal privileges of ownership, and among them his right to retain the cargo for the satisfaction of his claims under the agreement."[2]

The Admiralty Courts of Great Britain, on account of an alleged want of jurisdiction, refuse to enforce a lien on the cargo other than for freight due, and will not permit a retention for breach of the conditions of a charter-party, such as those concerning dead-freight, demurrage &c.[3] Our courts, adopting a more discerning public policy, have given efficacy and vitality to that principle of maritime law which studiously connects the interests of ship and cargo, and creates a reciprocal responsibility between the two, for the mutual advantage and more certain security of both.

With us there is a lien on goods laden on board the ship, for charges advanced,[4] for security on an adjustment for general average,[5] and when the whole of the ship is chartered at a specific rate per ton, the cargo must pay for what the ship could have carried, even though a full cargo had not been furnished.[6] Indeed, the American decisions generally, sustain the marine law to its full extent, and agree that to every contract of shipping, whether by bill of lading or otherwise, there is tacitly annexed the covenant to make the cargo *in specie*, liable for the due performance of the terms of the agreement, and upon breach, lien is enforced.[7]

[1] 4 Cowen, 470; 8 Taunt. 280; 5 Moore, 211; 3 Bin. N. C. 17.
[2] 8 Cranch, 39; 8 Wheat, 605.
[3] 2 Meriv, 401; 4 B. & Ald. 630.
[4] 19 Barb. 305.
[5] 13 Maine, 357.
[6] 15 Johns. 327.
[7] 4 Law Rep. 471; 8 Wheat. 605.

From the magnitude of the interests often involved, it becomes a question of considerable importance to know whether the owner's lien for his charter-party freight covers the goods of persons who have shipped under agreement with the charterer, and between whom and the owner of the vessel is no privity of contract; and if the goods so laden are liable at all, to what extent the responsibility amounts.

The cargo of the sub-freighters is liable to retention only for the freight which is due for the transportation of each individual consignment, and not for the whole amount specified in the charter-party as the hire of the ship.[1] That the ship should have a lien on each one of the lots of merchandise which it has conveyed, for the amount of the freight due for each separate lot, seems a conclusion at once equitable and necessary. Were it otherwise, by a collusive bargain with third parties, the charterer might deprive the owner of the vessel of the lien, to which, as carrier for the voyage, he was justly entitled.[2] To make the goods *in specie*, responsible for the freight earned by their carriage under each respective bill of lading, cannot prejudice the interests of the shipper, for the goods are in either case, obliged to that extent, and there should be no preference as to which party the freight money should be paid. But to extend their responsibility farther than this, would be to make the under freighters liable for the broken covenants, and non-performance of a private agreement between the owner and occupier of a vessel, of which they could know nothing; and on the other hand, would allow the charterer wrongfully to pledge the goods of another, for the satisfaction of his own debt.

In conclusion upon this branch of the subject which relates to the lien possessed by the ship, it may not be improper to state, that though the cargo itself is a security for the payment of freight, yet the determination of a consignment gives no liberty to the merchant shipper, to abandon it for the freight, for the contract of shipping does not contain any warranty against the happening of any such event.[3] In this the provisions of our maritime code coincide with

[1] 2 Atkyn, 621. [2] 4 B. & Ald. 630; 4 Camp. 298. [3] 3 John. 321.

the opinions of Pothier,[1] and Molloy,[2] who earnestly opposed the theory of Valin that the cargo was the *only* proper fund and pledge for the payment of the freight.

II.—LIEN OF THE CARGO ON THE SHIP.

"By custom" says Cleirac, "the ship is bound to the merchandise, and the merchandise to the ship."[3] Of the two principles embraced in the first portion of this maxim, one is drawn from the common law, and the other from our commercial codes and maritime usages. The one,—that the owner of a ship is responsible as a common carrier, is not open to contestation.[4] The other,—that the ship *in specie* is liable to the shipper on the undertaking in the bill of lading, for cargo taken on board, is less familiar in the settled adjudications, but is now admitted to be one of the most salutary regulations of the maritime law.[5] This privilege stands upon a basis of exact reciprocity, and the right of the shipper to consider the ship itself as a pledge for the performance of the shipping contract is recommended as well by the dictates of reason and justice as by an enlarged and enlightened public policy. The condition of the owners is not made worse by rendering the ship liable. It is immaterial to them whether the debt is satisfied by the sale of that, or any other portion of their property, but it is not a matter of equal indifference to the shipper, whether or not he is allowed to look to the vessel itself for satisfaction, as this is not only his best, but often will be found to be his only security. A ship is of necessity a wanderer. She visits places where her owners are unknown or at least inaccessible. These and other kindred characteristics of marine commerce render it indispensable that the ship itself should be security for those who have demands against the owners. A lien exists in favor of a merchant who ships goods in a vessel, against the ship for the non-performance of the contract of transportation, and it is a claim which our admiralty courts enforce by process *in rem*. The ship is, of itself and aside from any personal liability of the owners, considered as a security to the person who lades goods

[1] Traite de charte parte, rum. 60.
[2] Molloy. B. 2, C. 4, S. 12.
[3] Cleirac, ut et Con. 72.
[4] 21 Wend, 193.
[5] 3 Mason, 255.

on board of her.[1] Whether the vessel was under the control of the general owner for that particular voyage, or whether he had let her by charter-party to a third person who had entire direction and command, makes no difference as to this lien upon the vessel. The lien is enforced not only for the total loss of the goods laden on board, but for any damage they may sustain through the fault or neglect of the master, or by reason of the insufficiency of the vessel, rigging or crew. His remedy is not confined to an action *in personam* against the owner, but the vessel is by the law merchant hypothecated to the shipper for his damage, from the time the misfortune happens.[2] The owner of goods shipped and not delivered according to the bill of lading, has a lien on the vessel for their value.[3] For the price of cargo sold during the voyage from necessity it has been thought a lien exists.[4] The admiralty jurisdiction of England, though the general existence of this lien is admitted,[5] deny that any power is possessed by them to enforce such lien against the ship *in rem*, and in favor of the merchant shipper. While with them, this useful and important principle remains unexercised and worthless, our courts have, upon solid and convincing reasons, adopted and enforced the regulations of the marine law.

By the general maritime law of Europe the vessel is liable only to the value of the ship and freight for obligations arising *ex delicto*, and by an abandonment of them they are discharged. According to Emerigon, such, besides being the modern acceptation of the ship owner's responsibility, was the nautical law of the middle ages.[6]

The reason urged for such a limitation was, that a complete responsibility tended to discourage the speedy enlargement of commerce. The endeavor to thus define the liabilities of ownership in vessels, has never succeeded in this country.[7] With the exception of a few statutes passed by individual States, there is no departure

[1] 3 Kent's Com. 218; Ware, 263.

[2] The Rebecca, Ware, 188; 4 Law Rep. 384, 475.

[3] 1 Blatch. & How. 300.

[4] Cons. del Mare, chs. 105, 106; Cleirac Contrats marit. C. 4, art. 35, 36. Emerigon on Marit. Loans, C. 4, § 9; C 12. § 4.

[5] Abb. on Ship. 126, 127.

[6] 1 Contrats a la Grosse. C. 4. § 11.

[7] The Rebecca, Ware, 188; 1 Miller (Lou.) 259. 539.

from the common law rule that the obligation incurred goes to the whole extent of the injury sustained, whether the liability arises *ex contractu* or *ex delicto*.

The covenant in charter-parties, whereby the owner binds the ship, and the charterer binds the cargo for the due performance of the terms of that instrument, is in almost universal use in the commercial world. Though the right of lien for freight does not depend upon any especial agreement to pay freight, and though our courts have so completely carried into practice the maxim that "*Le batel est obligé à la marchandise et la marchandise au batel*" that they tacitly annex this as a covenant to every contract for the carriage of goods, yet it is often of consequence to ascertain what legal effect is attached to such a clause. The English cases deny that such a clause creates a lien for general security for the performance of the covenants contained in the charter-party, or that it gives either party a right to detain for any cause which he could not have done in the absence of such a clause.[1] The reason which appears to have been most cogently urged for such a doctrine seems to be, that because there was no active remedy by process *in rem* provided in all cases, no passive remedy by way of simple lien is allowed to either party, on account of the insertion of this binding clause into the charter-party. In our country where the admiralty jurisdiction is not confined within the same narrow limits,[2] a clause in the contract of charter or transportation, whereby the parties respectively bind the goods and vessel for the due performance of the covenants, payments and agreements thereof, is held to be a valid clause. It creates a lien on the goods for such performance and may be enforced against the goods or ship by detention and a suit in the admiralty.[3] In the leading case of the Volunteer, (cited *ante*) it was decided that such words were intended to create and reserve a lien by specialty, and should be so interpreted; that the words are sensible where they occur, the parties competent to contract, and as the terms of the agreement have in the maritime law a clear and determinate meaning, it is the duty of the courts to interpret

[1] 3 M. & S. 205.

[2] De Lovio *vs.* Boit 2 Gall. 398.

[3] The Volunteer, 1 Sumn. 551; 6 Pick. 252.

the contract so as to secure to the parties, the very rights and remedies which they intended to guaranty to each other.

Thus it will be seen that many of the old customs and statutes concerning lien have been revised and improved. Profiting by the common experience of nations and often disciplined by the tuition of alarming emergencies, it is thought that in this change mere innovation has been rejected, while fast hold has been laid upon all the means of essential and permanent progress. We have in so far advanced in the theory of international morality, and the active observance of the rules of justice among States, that instead of being burdened on this subject with an array of commercial usages which form merely what Azuni termed "a chaotic mass of scholastic disquisitions," we recognize a series of comely and universally practical marine regulations, which though subject to various modifications according to the different requirements of each nation, are by virtue of their very nature identical in all. Embracing, as this branch of commercial regulations does, the greatest public and private interests, it is imperatively necessary that amidst the circumstantial variety of its regulations, essential unity should still be preserved, and that every where, the law of maritime liens should be administered with a view to the public policy, and in the spirit of ample and substantial justice. Of the admiralty jurisdiction of these States, it may well be said, that they have so enlarged and increased the once meagre and unsatisfactory privileges of lien; have rendered their courts so easily and universally accessible, and have above all, so throughly adapted their process and decrees to commercial usages and wants, that now, either party may upon application, have meted out to him almost that perfect justice, which is administered "freely and without purchase; completely and without denial; speedily and without delay."